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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 571

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN T. HARDING,
DAVID A. MURPHY,
Kansas City, Missouri,
Attorneys for Petitioner.

R. CARTER TUCKER,
HARDING, MURPHY & TUCKER,
Kansas City, Missouri,
Of Counsel.

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W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, W. F. Coen, alleges and respectfully shows to this Honorable Court, as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On or about March 5, 1935, F. E. Colvin and W. B. DeArmond called at petitioner's office in Kansas City, Missouri, and inquired of petitioner if he would be interested in purchasing, at a discount, a note secured by tax bills of Henderson County, North Carolina (R. 34, 35). They were told by petitioner, after some discussion, that he was not familiar with North Carolina tax bills and that he would not be interested (R. 35).

Shortly thereafter, they returned to petitioner's office, and inquired of petitioner if he would be interested in purchasing the note if its payment should be guaranteed by a reliable surety company (R. 36). To this inquiry, petitioner replied that if the guaranty was provided by a good surety company, he would be interested in purchasing the note (R. 36).

Later a Mr. Bowers was brought into petitioner's office by Mr. Colvin and Mr. DeArmond and the former was introduced to petitioner as a member of the firm of Gem City Finance Company, Inc., of North Carolina, which was represented as the firm whose note was to be sold, and Mr. Bowers represented to petitioner that he could, without difficulty, obtain the guaranty of American Surety Company of New York through his acquaintance with a Mr. Nye, who, he represented, was an agent of the surety company in another territory (R. 37).

The note in question was dated March 14, 1935, was in the principal amount of $3,500, due ninety days from date with interest at the legal rate allowed by law, was payable to the order of F. E. Colvin, and was purportedly signed by Gem City Finance Company, Inc., by W. Erdman Love, President, attested by J. B. Bowers, Secretary and Treasurer, and it bore what purported to be the cor-

porate seal of said Gem City Finance Company, Inc. (R. 41, Exh. 1).

After several visits to petitioner's office, Mr. Colvin and Mr. DeArmond exhibited to petitioner a form of guaranty bond which they said would be given to guarantee payment of the note. Petitioner took the form of bond to his attorney, who made some changes, and it was then returned to Mr. Colvin and Mr. DeArmond, and they were told by petitioner that if they could arrange for American Surety Company of New York to execute the bond in substantially that form, he would consider the purchase of the note (R. 36).

Approximately ten days later, Mr. Colvin, Mr. DeArmond and Mr. Bowers submitted to appellant the bond which they intended to give as a guaranty of the note (R. 37-38). At the head of it there was printed "American Surety Company of New York, N. Y." It was in the principal amount of $3,500 and was conditioned, in substance, that if Gem City Finance Company, Inc., should pay to F. E. Colvin, or his assigns, the sum of $3,500, with interest on or before June 14, 1935, the bond would be void; but that if said Gem City Finance Company, Inc., should default in the payment of its said note, said F. E. Colvin, or his assigns, should be reimbursed by American Surety Company of New York in the amount of $3,500, together with expenses incurred in the collection of the note. The bond was purportedly signed by "American Surety Company of New York, N. Y., by L. Bert Nye, General Agent and Attorney in Fact" (R. 59-63, Exh. 2).

Petitioner was unwilling to release the money in payment for the note until after he had received from the home office of respondent a letter confirming the bond. He, therefore, required of Mr. Colvin, Mr. DeArmond and Mr. Bowers that they secure a letter of confirmation of the bond from respondent's home office (R. 47, 49, 81, 91, 92).

Thereafter, Mr. Colvin and Mr. DeArmond deposited the bond in the trust department of the First National Bank of Kansas City, and petitioner deposited a cashier's draft in the amount of $3,000, in pursuance of an escrow agreement executed by petitioner, Mr. Colvin, Mr. DeArmond and the First National Bank of Kansas City, in which the bank, as escrow agent, upon receiving direct advice from American Surety Company of New York that the bond was authorized, and that it recognized its responsibility thereunder, was directed to issue a cashier's draft for $2,500 payable to V. B. Bowers, Jr., and a cashier's draft to W. B. DeArmond for $500 and to deliver to petitioner the note and the guaranty bond. The escrow agreement provided that the escrow agent should not act upon any authorization received from American Surety Company of New York until after such authorization had been approved by petitioner (R. 84, 85, Exh. 5).

Before entering into the escrow arrangement described in the preceding paragraph, petitioner had sent a telegram to respondent at its home office in New York, which was as follows (R. 45, Exh. 3):

> "Has Bert Nye your company power to execute guaranty bond and where. Wire collect Western Union."

Respondent answered, by wire, as follows (R. 46, Exh. 4, 67):

> "L Bert Nye is our manager Washington D C and has power to execute bonds within certain limitations. If further information desired suggest you see W R Evans our manager your city."

After receipt of respondent's telegram, petitioner went to respondent's Kansas City office and there conferred with Mr. Evans. He told Mr. Evans the facts known to him concerning the note and the proposal to give the guaranty bond, showed Mr. Evans the telegram

that had been received from the home office of respondent and, after some conversation in respect to the transaction, Mr. Evans said to petitioner, "I know Bert Nye's signature, and when that bond arrives here in Kansas City I can tell you when I see the bond, I can tell you beyond any doubt whatsoever as to whether or not it is a genuine bond" (R. 47).

Petitioner then told Mr. Evans that he would rely entirely upon his confirmation of the bond and that he wanted him to go with him to the First National Bank after the letter of confirmation had arrived and tell him if the guaranty bond was the valid obligation of respondent (R. 47).

Shortly afterward, petitioner was notified by the bank that a copy of the letter from respondent confirming the bond had been received (R. 49). Petitioner had received, by air mail, the original of this letter. It was written upon what appeared to be the stationery of respondent, was addressed to petitioner, and it stated, in substance, that the bond was confirmed (R. 53, Exh. 6). It was purportedly signed by "H. A. Reiss, Assistant Superintendent of Agencies" of respondent (R. *Id.*).

Afterward, petitioner, accompanied by Mr. Evans, went to the trust department of the First National Bank of Kansas City. At this meeting, Mr. Fred S. Riley, Assistant Trust Officer of the First National Bank, exhibited to Mr. Evans the guaranty bond and the letter which was purportedly from the home office of respondent, and Mr. Evans, after having examined these documents, assured petitioner that the letter confirming the bond had come from respondent's home office in New York; that the bond was valid and represented the binding obligation of respondent; and that it was "like money on the barrel-head" (R. 52, 103).

Thereafter, the bank executed the escrow agreement by delivering $2,500 to Mr. Bowers, $500 to Mr. DeAr-

mond, and by delivering to petitioner the note and guaranty bond.

At the maturity of the note, it was not paid, and petitioner demanded that respondent make good its guaranty (R. 80). It declined liability under the guaranty bond on the ground that it was a forgery. Thereafter, suit was instituted by petitioner in the Circuit Court of Jackson County, Missouri, at Kansas City, and petitioner, as plaintiff in that action, suffered an involuntary non-suit (R. 140), and, thereafter, instituted the instant action in the United States District Court for the Western Division of the Western District of Missouri to recover on the guaranty bond.

Respondent pleaded in its answer, and produced substantial evidence to show, that the note purchased by petitioner (R. 153-155), the guaranty bond (R. 141-151) and the letter purporting to have come from respondent's home office as confirmation of the bond (R. 156-159) were forgeries.

Respondent's evidence in respect to the genuineness of the signature on the guaranty bond consisted of, among other things, a specimen of the signature of L. Bert Nye and an impression of respondent's corporate seal (R. 147, Def. Exh. 5).

Petitioner, in his reply, denied respondent's allegations of forgery and pleaded that by reason of the facts detailed above, respondent was estopped to assert the invalidity of the guaranty bond (R. 11).

At the close of petitioner's evidence, the District Judge, being of the opinion that Mr. Evans, Manager of respondent's branch office at Kansas City, was without authority to confirm the bond in behalf of respondent (R. 113-123), sustained respondent's motions to strike (1) the testimony of petitioner of statements made by Mr. Evans in respect to the genuineness of the bond and the confirmation letter (R. 109, 110), and (2) similar tes-

timony given by the witness Fred S. Riley, Trust Officer of the First National Bank of Kansas City (R. 110, 111), and denied respondent's motion to strike from the record the guaranty bond and the purported letter of confirmation (R. 109, 129).

At the close of all the evidence, the District Judge sustained respondent's motion for a directed verdict (R. 188) and entered judgment for respondent (R. 19). On appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed (R. 225). Judge Thomas delivered the opinion of the Circuit Court of Appeals, which was concurred in by Judge Sanborn (R. 206-221). Judge Gardner filed a separate dissenting opinion (R. 221).

The Circuit Court of Appeals, affirming the judgment of the District Court, held (a) that under the evidence presented, W. R. Evans, Manager of respondent's office in Kansas City, Missouri, was without authority to confirm the validity of the guaranty bond for and in behalf of respondent; (b) that, accordingly, his declarations made in respect to the validity of the guaranty bond were inadmissible in evidence and were properly stricken from the record by the District Judge; (c) that the introduction into evidence of the genuine signature of L. Bert Nye, the purported signer of the guaranty bond, did not present a question for the jury in respect to the validity of the guaranty bond for the reason that delivery of the guaranty bond by respondent was not shown; and (d) that notwithstanding the provisions of Rule 8(c) of the Federal Rules of Civil Procedure, the burden was upon petitioner to prove execution and delivery of the guaranty bond and that he had failed to sustain the burden.

II.

JURISDICTION.

(a) The jurisdiction of this Court is invoked by petition for writ of certiorari under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (Title 28, United States Code Annotated, Section 347(a)).

(b) The judgment of the District Court was rendered January 31, 1940 (R. 19). Appellant's motion for new trial was overruled by the District Court on July 9, 1940 (R. 21). The opinion and judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, was rendered June 9, 1941 (R. 206). Appellant's motion for rehearing was filed in the Circuit Court of Appeals on June 24, 1941 (R. 227-231), and was denied on July 3, 1941 (R. 233). Upon motion of appellant (R. 233), the mandate of the Circuit Court of Appeals was stayed for a period of sixty days from July 17, 1941 (R. 234), to allow petitioner sufficient time within which to file its petition for writ of certiorari in this Court.

(c) The nature of the case is sufficiently shown in the "Summary Statement of the Matter Involved," *ante*, and for sake of brevity, a separate statement here is omitted.

(d) Cases believed to sustain the jurisdiction of the Court are *Gay* v. *Ruff*, 292 U. S. 25; *Spiller* v. *Atchison, Topeka & Santa Fe Railway Company*, 253 U. S. 117; *Ruhlin et al.* v. *New York Life Insurance Company*, 304 U. S. 202; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

III.

THE QUESTION PRESENTED.

The question presented for determination is whether, under controlling decisions of the Supreme Court of Missouri, the Circuit Court of Appeals erred in holding (a) that W. R. Evans, Manager of respondent's Kansas City office, was without authority to confirm the validity of the guaranty bond for, and in behalf of, respondent; (b) that the declarations made by Mr. Evans in respect to the validity of the guaranty bond were inadmissible because violative of the hearsay rule, and (c) that the evidence was insufficient to show execution of the guaranty bond by respondent.

The case presents the further question of whether the Circuit Court of Appeals, under the provisions of Rule 8(c) of the Federal Rules of Civil Procedure, erred in holding that the burden lay upon petitioner to prove that the guaranty bond was not a forgery.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

(a) The Circuit Court of Appeals, by holding that W. R. Evans, Manager of respondent's office in Kansas City, Missouri, was without authority to confirm the validity of the guaranty bond for and in behalf of respondent, decided an important question of local law in a manner in direct conflict with the case of *James H. Forbes Tea & Coffee Co.* v. *Baltimore Bank,* 345 Mo. 1151, the most recent decision of the Supreme Court of Missouri in respect to the actual and implied authority of the manager of a branch office of a corporation conducting its business in Missouri.

(b) The Circuit Court of Appeals, by holding that the declarations of W. R. Evans, respondent's Kansas City manager, were inadmissible in evidence because violative of the hearsay rule, decided an important question of local law in a manner in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Shelton* v. *Wolf Cheese Co.*, 338 Mo. 1129; *Whittington* v. *Westport Hotel Operating Co.*, 326 Mo. 1117; *Philibert* v. *Benjamin Ansehl Co.*, 342 Mo. 1239; *Simpson Adv. Service Co.* v. *Manufacturers & Merchants Ass'n*, 330 Mo. 1049; and *State* v. *Armour Packing Co.*, 173 Mo. 356.

(c) The Circuit Court of Appeals, by holding that the introduction into evidence by respondent of the genuine signature of L. Bert Nye did not show *prima facie* the genuineness of the guaranty bond, decided an important question of local law in a manner (1) in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of *Sanders* v. *North End Building & Loan Ass'n*, 178 Mo. 674; *State* v. *Thompson*, 141 Mo. 408; and *State* v. *Pace*, 269 Mo. 682, (2) in conflict with, and violative of, Section 1751, Missouri Revised Statutes, 1929, and (3) in conflict with, and violative of, the federal statute in respect to proof of disputed writings (28 United States Code Annotated, Section 638).

(d) The Circuit Court of Appeals, by holding that the burden of proof lay upon petitioner to prove that the guaranty bond was not a forgery, decided an important procedural question in a manner violative of the provisions of Rule 8(c) of the Federal Rules of Civil Procedure.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and over the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify to and send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case entitled on its docket "*W. F. Coen,*

Appellant, v. *American Surety Company of New York, a corporation, Appellee, No.* 11881," and that the judgment of said United States Circuit Court of Appeals for the Eighth Circuit may be reviewed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court shall seem appropriate, and petitioner will ever pray, etc.

W. F. Coen,
Petitioner.

By: John T Hudson
D A Murphy
Attorneys for Petitioner.